TABLE OF CONTENTS

	PAGE
PRELIMINARY	2
COUNTER-STATEMENT OF THE CASE	3
REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI	9
CONCLUSION	12

CASES CITED

Kaufman v. Moss, 420 F. 2d 1270 (3rd Cir. 1970)	11
Mead v. Randall, 111 Mich. 268, 69 N.W. 506 (Sup. Ct. 1896)	10
Sooner State Dairies, Inc. v. Townley's Dairy Co., 406 F. 2d 1328 (10th Cir. 1969)	11

FEDERAL STATUTE CITED

Civil Rights Act (42 U.S.C. §1983)	3, 10, 11

FEDERAL RULES OF CIVIL PROCEDURE CITED

Rule 65 (a)(2)	10

TEXTS CITED

Moore's Federal Practice, Vol. 7 (2d Ed. 1972)	10
Rose, Federal Jurisdiction and Procedure (4th Ed. 1931)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-576

PHILIP A. ROBINSON, JACOB A. ROBINSON and KATE ROBINSON,

Petitioners,

vs.

DR. LLOYD W. McCORKLE, Commissioner, Individually and as Head of the Department of Institutions and Agencies; DR. RUFUS R. LITTLE, Individually and as Superintendent of Bergen Pines County Hospital; BERGEN PINES COUNTY HOSPITAL; RALPH W. CHANDLESS, Borough Attorney; HARRY H. CHANDLESS, JR., Municipal Magistrate; JOHN KAPHON, Clerk, Municipal Court; ARTHUR H. VAN HOUTEN, Chief of Police; CAPT. WILLIAM D. NOONAN; SGT. HOWARD R. BAKER, JR., SGT. EUGENE F. DATES; SGT. GIRARD K. DOMMENGE; PTL. PETER A. BRUINOOGE; PTL. BRUCE H. WERNER; SGT. HARRY P. CARTY, JR.; PTL. DONALD E. WORSTER; PTL. WILLIAM H. BISCHOFF; Ex-Chief HARRY P. CARTY, SR.; Ex-PTL. JOHN W. RUROEDE, JR., Individually and as Police Officers,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION SUBMITTED BY THE EMPLOYEES AND OFFICIALS OF THE BOROUGH OF HASBROUCK HEIGHTS, NEW JERSEY

Preliminary

This Brief is submitted on behalf of 15 separate defendants who are collectively referred to as the Employees and Officials of Hasbrouck Heights, New Jersey. The individuals consist of the Borough Magistrate; the Borough Attorney; the Clerk of the Municipal Court; the present and former Police Chiefs, and certain present and former Police Officers of the Borough, whose names are:

Harry H. Chandless

Ralph W. Chandless

John Kaphon

Arthur Van Houten

Harry P. Carty, Sr.

William D. Noonan

Howard Baker, Jr.

Eugene Dates

Girard Dommenge

Peter Bruinooge

Bruce H. Werner

Harry P. Carty, Jr.

Donald Worster

William Bischoff

John W. Ruroede

Counter-Statement of the Case

This is an action brought under the Civil Rights Act (42 U.S.C. § 1983) and it alleges that Philip Robinson was wrongfully confined on two occasions in the Bergen Pines County Hospital. There are three separate groups of defendants, the first defendant is a group of fifteen individuals known as the Employees and Officials of the Borough of Hasbrouck Heights (Hasbrouck Heights defendants) and they are the parties submitting this brief. The second defendant is Dr. Lloyd W. McCorkle, the Commissioner of the New Jersey Department of Institutions and Agencies and the third defendant is Dr. Rufus R. Little, the Superintendent of Bergen Pines County Hospital together with Bergen Pines County Hospital.

The original complaint was filed on December 17, 1969. On December 24, 1969 Judge Whipple in the District Court, signed an order to show cause requiring the defendants to appear before him on January 5, 1970 and state why they should not be restrained from taking any further action re the commitment of Philip Robinson. This application for a temporary restraint was withdrawn by the Robinson's counsel.

On February 9, 1970 the defendants moved to dismiss the complaint on a number of grounds. In support of their motion the so called Hasbrouck Heights defendants filed lengthy affidavits with the Court. These affidavits were filed in February of 1970. These factual affidavits were before the Court when it entered the order appealed from one year later on February 10, 1971. In the intervening year plaintiff filed no affidavits in reply. The following is a brief factual outline of the case.

On April 18, 1969, plaintiff, Philip Robinson, while operating his motor vehicle on the Boulevard in Hasbrouck

Heights collided with a Borough police car. The officer driving the car, Peter A. Bruinooge, stated his car was struck five times by the plaintiff. At the scene of the accident, plaintiff was arrested by Borough officers Dommenge and Ruroede and taken to Police Headquarters where he was charged with atrocious assault and battery on the person of police officer Bruinooge.

At Police Headquarters, plaintiff was also charged with reckless driving; and as a result of an incident at Police Headquarters two additional police officers charged the plaintiff with assault and battery. In the early evening of April 18, 1968, defendant, Harry H. Chandless, Jr., Judge of the Municipal Court of Hasbrouck Heights, was called to Police Headquarters for the purpose of fixing bail and to afford the plaintiff a preliminary hearing in respect to the charges made against him.

Plaintiff was represented at the hearing by family attorney, Murray Ludmer. At the hearing Philip Robinson appeared violent and incoherent to both magistrate Chandless and attorney Ludmer. After conferring with his client, Mr. Ludmer advised the court that his client would not follow his advice and would not allow bail arrangements to be made.

In light of plaintiff's violent and incoherent conduct before the Municipal Magistrate, his preliminary hearing was not held and he was committed to Bergen Pines County Hospital for the statutory period of observation. Plaintiff's attorney, Mr. Ludmer, was present when said commitment order was signed and made no objection to same. It should also be noted that Philip Robinson's mother and sister were at the jail on the night in question and conferred with attorney Ludmer.

On April 18, 1968 at 9:10 P.M. plaintiff was admitted to Bergen Pines County Hospital in Paramus, New Jer-

sey. Upon admission to the hospital plaintiff was examined by staff psychiatrist Dr. M. Amin. After interviewing plaintiff on the date of his admission and days thereafter, Dr. Amin on April 22, 1968 wrote to Magistrate Chandless stating of the plaintiff that "psychiatrically he is a sick man. He is unable to form abstract concepts. His reality orientation is poor and he appears to be hearing voices. These features combined with his behavior in the ward in general leads me to conclude that he is suffering from a Schizophrenic illness."

After fourteen days confinement plaintiff, Philip Robinson, was released from Bergen Pines Hospital in the custody of his parents and was subsequently admitted to Fair Oaks Hospital, Summit, New Jersey, by his family. Fair Oaks is a private mental institution from which institution plaintiff was discharged fifteen days thereafter.

On April 26, 1968 Attorney Donald R. Conway appeared before Magistrate Chandless of the Hasbrouck Heights Municipal Court and stated that he represented plaintiff, Philip Robinson, and requested copies of the complaints on file against said plaintiff. Said documents were furnished and on July 10, 1968, after having been released from Fair Oaks Hospital plaintiff, Philip Robinson, executed a waiver of preliminary hearing on the charges against him and on July 18, 1968, all of the complaints and papers on file relative to said complaints were forwarded by the Municipal Court to the Bergen County Prosecutor's office. Subsequently, the Bergen County Grand Jury handed down an indictment charging plaintiff, Philip Robinson, with atrocious assault and battery as a result of the automobile accident of April 18, 1968. Commencing on May 27, 1969, trial was held in the Bergen County Court on said indictment before the Honorable Benjamin P. Galanti. On May 29, 1969, the jury in said case brought in a verdict of not guilty.

On September 26, 1969, while police officer Bruce Werner was standing on the corner of Franklin Avenue and the Boulevard in Hasbrouck Heights, Philip Robinson allegedly pulled up to a traffic light and screamed "Werner you bastard, you conspired to kill Senator Kennedy and I am going to get the K.B.G. the Soviet Secret Police to put a bullet in your head." Officer Werner reported this incident to his superiors; Chief Arthur Van Houten of the Hasbrouck Heights Police Department ordered an investigation into the matter together with an examination of any witness to the incident. Said investigation revealed a witness, Mrs. Shirley Kemp, who corroborated the officer's statement.

In light of plaintiff Philip Robinson's past medical problems, Chief Van Houten held the report of Officer Werner, relative to the incident described above, in abeyance. Officer Werner did not file a formal complaint until November 6, 1969.

After the incident of September 29, 1969 involving Officer Werner, plaintiff Philip Robinson did not come in contact with the Hasbrouck Heights Police Department until November 4, 1969 when he approached defendant, Ralph W. Chandless, Borough Attorney for Hasbrouck Heights, and threatened his life. The incident happened in the Methodist Church at Division Avenue in Hasbrouck Heights. Plaintiff Robinson stated to defendant Ralph Chandless "I will kill you and other members of your family as you are members of a group responsible for the death of Robert Kennedy." As a result of this incident, Ralph Chandless filed a complaint against plaintiff Philip Robinson on November 6, 1969.

At approximately 9:00 A.M. on November 6, 1969, Robert I. Rafford, Borough Clerk of Hasbrouck Heights

entered his office to commence his day's work. When Mr. Rafford reached his office at the Municipal Building he found Mayor Imken of Hasbrouck Heights there talking with a Miss Davenport who is a Deputy Clerk for the Borough. Plaintiff Robinson rushed into the office and appeared to flash a silver object in the palm of his hand. The affidavit of Mr. Rafford states that plaintiff Robinson appeared emotionally disturbed. Mayor Imken asked the plaintiff who he was and the man responded in a loud voice, "I am God, I am God, I am God." After this incident plaintiff Robinson left the building and at approximately 9:15 A.M. on November 6, 1969, he approached Hasbrouck Heights Borough Councilman David MacPherson when Mr. MacPherson was coming out of his residence on Washington Place, Hasbrouck Heights. Plaintiff Robinson allegedly grabbed Mr. MacPherson by the coat and threatened to kill him and others as they were responsible for the death of Robert Kennedy. As a result of this incident, David MacPherson signed a complaint against plaintiff Philip Robinson on November 6, 1969.

In light of all of these incidents that transpired on November 4, and the morning hours of November 6, 1969, Chief Van Houten directed Officer Werner to proceed with his complaint against plaintiff Philip Robinson arising out of the incident that occurred on September 29, 1969. The complaint was filed in the Municipal Court on November 6, 1969, and a warrant was issued by the Clerk of the Municipal Court. The complaint alleged that plaintiff Philip Robinson had threatened the life of Police Officer Werner.

In the normal course of procedure the warrant was issued by the Clerk of the Municipal Court and delivered to Sergeant Harry Carty and Captain William Noonan of the Hasbrouck Heights Police Department for service.

Later in the afternoon of November 6, 1969, plaintiff Philip Robinson was located at his home in Hasbrouck Heights. Plaintiff refused to admit the officer's attempting to serve the warrant and actually barricaded himself in his home and threatened to kill anyone who entered. When Chief Van Houten was informed of this action, he joined the other officers at the Robinson home and ordered that no efforts be made to take plaintiff Philip Robinson into custody at the present time and that instead, his attorney, Donald Conway, should be contacted. After attorney Conway arrived on the scene he was allowed to enter the house alone and talk to Philip Robinson; upon his exit he advised the police that Robinson had appeared incoherent and violent and that he was unable to convince him to surrender. It was only after all efforts to peacefully bring Philip into custody had failed that the Hasbrouck Heights Police entered the Robinson residence for the purpose of making an arrest. Robinson forcibly resisted arrest and it was necessary to subdue him. At the time of his arrest he had a six inch knife in his possession.

In view of the incoherent and violent nature of Philip Robinson, the police did nothing relative to the Werner warrant. Philip Robinson was again committed to Bergen Pines County Hospital for psychiatric observation on November 6, 1969, pursuant to the second commitment order which was attached to the complaint.

On November 20, 1969, Philip Robinson's counsel moved a writ of Habeas Corpus in the New Jersey Superior Court, Bergen County, Chancery Division. The Honorable Morris Malech signed an order providing that, inasmuch as Philip Robinson was not yet cured and required further treatment, he was to be placed in the custody of officials of Bergen Pines Hospital or the Bergen

County Sheriff's Department and of Jacob Robinson, his father, and that he was to be transported to the Carrier Clinic, Belle Meade, New Jersey, an institution for mental diseases for further treatment.

All of the facts set forth above were encompassed in affidavits which were filed with Judge Whipple in the District Court in February of 1970, and were part of the Appendix and Supplemental Appendix before the Third Circuit. The trial court entered its order of dismissal as to certain defendants one year later in February, 1971. In the intervening year, plaintiff had filed no affidavits which rebutted or contradicted those filed by the defendants.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

The court was entitled to consider the affidavits filed by defendants in opposition to plaintiff's application for a preliminary injunction.

The First Complaint in this matter (there have been two Amended Complaints) was filed December 17, 1969. On December 24, 1969, Judge Whipple in the United States District Court for the District of New Jersey, signed an Order to Show Cause requiring all defendants to appear before him on January 5, 1970, and state why they should not be enjoined from taking any further action re the commitment of one Philip Robinson. At the same time, defendants cross moved for a dismissal of the complaint and in support of said Motion and in opposition to plaintiffs' request for an injunction they filed certain affidavits. The request for the injunction was ultimately withdrawn by plaintiffs.

It is the position of the Petitioners that the District Court committed error when it considered these affidavits in ruling on a second motion to dismiss filed by the respondents one year after the affidavits had been filed. It is respectfully submitted that Petitioners are wrong for two reasons.

First, the District Court did not consider the affidavits when it dismissed the suit as to certain defendants. The court ruled the action should be dismissed because the Complaint failed to allege specific allegations, as are required, under the Civil Rights Act (42 U.S.C. 1983). The Court's reasoning is set forth in the Appendix particularly page 17a.

The Second reason that Petitioners are in error is that while the Court did not consider the Affidavits on file it would have been perfectly proper for the Court to so consider said documents. Rule 65 (a) (2) of the Federal Rules of Civil Procedure as amended to July 1, 1972, provides in part:

> . . . any evidence received upon an application for a Preliminary Injunction which would be admissible upon the trial on the merits becomes a part of the record on the trial and need not be repeated upon the trial.

The above language was added to the Federal rules by an Amendment that became effective July 1, 1966. Thus the case of *Mead* v. *Randall,* 111 Mich. 268, 69 N. W. 506 (Sup. Ct. 1896) and the treatise of Rose, Federal Jurisdiction and Procedure (4th Edit. 1931) cited by Petitioners pre-date the above rule, Professor Moore in Moore's Federal Practice (2nd Edit. 1972) states in Volume 7 at Section 65.04[5]:

> "Subdivision (a) (2) deals with the preservation of the evidence itself and presupposes that there will be a subsequent trial on the merits. It does not deal with the use of the evidence in an intervening motion for summary judgment. Prior to the addition of subdivision (a) (2), however, it had been held that evidence taken at a hearing on an application for a preliminary injunction could be used, along with the items specified in Rule 56 in disposing of a motion for summary judgment, and there is nothing in Rule 65 that precludes its use."

It should be noted that the case of *Sooner State Dairies, Inc.* v. *Townley's Dairy Co.*, 406 F. 2nd 1328 (10th Cir. 1969) is also cited by Professor Moore in a footnote to the above section. In said case the Tenth Circuit held that a finding based on an interlocutory hearing would not serve as the ground for a final judgment. In the appeal *sub judice* it must be remembered the request for a preliminary injunction was withdrawn by Philip Robinson after the Affidavits in question were filed. It is respectfully submitted that in such circumstances the trial court was free to consider said affidavits or put them aside within its own discretion.

The second point above is presented merely in reply to allegations raised by Petitioners in their Brief. The key point that rebuts all of Petitioners' contentions is that the District Court, as well as the Third Circuit, found that Plaintiff's Complaint failed to allege specific allegations that are necessary under (42 U.S.C.A. § 1983), *Kaufman* v. *Moss*, 420 F. 2nd 1970 (3rd Cir. 1970). Thus, the opinion below does not rest on the affidavits which Petitioner is attempting to raise as a straw man before this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals, for the Third Circuit should be denied.

Respectfully submitted,

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